

1 HOGAN LOVELLS US LLP
2 Mark C. Goodman (Bar No. 154692)
3 Ethan A. Miller (Bar No. 155965)
4 Stacy Hovan (Bar No. 271485)
5 3 Embarcadero Center, Suite 1500
6 San Francisco, California 94111
7 Telephone: (415) 374-2300
8 Facsimile: (415) 374-2499
9 mark.goodman@hoganlovells.com
10 ethan.miller@hoganlovells.com
11 stacy.hovan@hogan lovells.com

12 Attorneys for Defendant
13 Bimbo Bakeries USA, Inc.

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ALEX ANG and LYNN STREIT,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

BIMBO BAKERIES USA, INC. ,

Defendant.

Case No. 13 Civ. 1196 (EMC)

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF MOTION TO DISMISS
AMENDED COMPLAINT**

1 Pursuant to Rule 201 of the Federal Rules of Evidence, Defendant Bimbo Bakeries USA,
 2 Inc., ("BBUSA") hereby requests that the Court take judicial notice of the attached exhibits,
 3 which are true and correct copies of the following:

4 Exhibit 1: Package for Sara Lee 100% Whole Wheat bread (1 lb. 4 oz.);

5 Exhibit 2: Photographs of the front and back of Exhibit 1 and artwork for the label
 6 provided by the manufacturer;

7 Exhibit 3: Package for Sara Lee 100% Whole Wheat bread (20 oz.);

8 Exhibit 4: Photographs of the front and back of Exhibit 3 and artwork for the label
 9 provided by the manufacturer;

10 Exhibit 5: Package for Sara Lee Classic 100% Whole Wheat bread (1 lb. 4 oz.);

11 Exhibit 6: Photographs of the front and back of Exhibit 5 and artwork for the label
 12 provided by the manufacturer;

13 Exhibit 7: Package for Sara Lee Classic 100% Whole Wheat bread (16 oz.);

14 Exhibit 8: Photographs of the front and back of Exhibit 7 and artwork for the label
 15 provided by the manufacturer;

16 Exhibit 9: Package for Sara Lee Soft and Smooth 100% Whole Wheat bread (1 lb. 4 oz.);

17 Exhibit 10: Photographs of the front and back of Exhibit 9 and artwork for the label
 18 provided by the manufacturer;

19 Exhibit 11: Package for Sara Lee Soft and Smooth 100% Whole Wheat bread (20 oz.);

20 Exhibit 12: Photographs of the front and back of Exhibit 11 and artwork for the label
 21 provided by the manufacturer;

22 Exhibit 13: Package for Thomas' Bagel Thins Plain (1 lb. 10 oz.);

23 Exhibit 14: Photographs of the front and back of Exhibit 13 and artwork for the label
 24 provided by the manufacturer;

1 Exhibit 15: Package for Thomas' Bagel Thins Plain (2 lbs. 7 oz.);

2 Exhibit 16: Photographs of the front and back of Exhibit 15 and artwork for the label
3 provided by the manufacturer;

4 Exhibit 17: Package for Thomas' Bagel Thins Plain (13 oz.) (THUS05-1345-30-06);

5 Exhibit 18: Photographs of the front and back of Exhibit 17 and artwork for the label
6 provided by the manufacturer;

7 Exhibit 19: Package for Thomas' Bagel Thins Plain (13 oz.) (THUS05-1345-30-05);

8 Exhibit 20: Photographs of the front and back of Exhibit 19 and artwork for the label
9 provided by the manufacturer;

10 Exhibit 21: Package for Bimbo Toasted Bread;

11 Exhibit 22: Photographs of the front and back of Exhibit 21 and artwork for the label
12 provided by the manufacturer;

13 Exhibit 23: Photographs of the front and back of the Entenmann's Soft'ees Family Pack
14 and artwork for the label provided by the manufacturer;

15 Exhibit 24: Letter dated April 5, 2013 from Mark C. Goodman to Ben F. Pierce Gore;

16 Exhibit 25: Joint Stipulation re Time to File Amended Complaint and Time to Respond
17 Thereto and Request to Set Modified Briefing Schedule, dated April 19, 2013, *Ang, et al. v.*
18 *Bimbo Bakeries USA, Inc.*, Case No. 13-civ-01196, Docket No. 13;

19 Exhibit 26: Letter dated April 19, 2013 from Ben F. Pierce Gore to Mark C. Goodman
20 and Ethan A. Miller;

21 Exhibit 27: Letter dated May 17, 2013 from John C. Lee to Alex Ang and Lynn Streit;

22 Exhibit 28: Materials from the American Heart Association website, available at:
23 http://www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/HeartSmartShopping/Heart-Check-Mark_UCM_300133_Article.jsp;

1 Exhibit 29: U.S. Food and Drug Administration, *Compliance Policy Guide* § 505.350,
 2 January 1977, Revised October 1980, Reissued March 1988, available at:
 3 <http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/ucm074423.htm>;

5 Exhibit 30: Excerpts from U.S. Food and Drug Administration, *Food Labeling: Nutrient*
 6 *Content Claims, General Principles, Petitions, Definitions of Terms; Definitions of Nutrient*
 7 *Content Claims for the Fat, Fatty Acid, Cholesterol Content of Food*, 58 Fed. Reg. 2302 (January
 8 6, 1993);

9 Exhibit 31: U.S. Food and Drug Administration, *Draft Guidance: Whole Grain label*
 10 *Statements* (February 17, 2006), available at:
 11 <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm059088.htm>;

13 Exhibit 32: Excerpts from U.S. Food and Drug Administration, *Food Labeling: General*
 14 *Requirements for Health Claims for Food*, 58 Fed. Reg. 2478 (January 6, 1993);

15 Exhibit 33: Federal Trade Commission, *Guides for the Use of Environmental Marketing*
 16 *Claims*, 77 Fed. Reg. 62122 (October 11, 2012).

17 Exhibits 1 through 23, the identified “purchased products” packaging and labels, are
 18 referred to and thereby incorporated into the complaint. (First Amended Complaint (“FAC”) at
 19 §§ 46-141). Accordingly, the Court may properly take judicial notice of those materials and
 20 consider them for purposes of the motion to dismiss the complaint. *See, e.g., Marder v. Lopez*,
 21 450 F.3d 445, 448 (9th Cir. 2006); *No. 84 Employer-teamster Joint Council Pension Trust Fund v.*
 22 *Am. W. Holding Corp.*, 320 F.3d 920, 925 n.2 (9th Cir. 2003).

23 Exhibit 28 contains screenshots of materials available from the website of the American
 24 Heart Association’s Heart Check program, which are referred to and quoted in the amended
 25 complaint (*see* FAC at §§ 56-74) and, thus, have been incorporated into the amended complaint.
 26 Again, such materials are properly judicially noticed and considered for purposes of the motion to
 27 dismiss. *See, e.g., Marder v. Lopez*, 450 F.3d at 448; *No. 84 Employer-teamster Joint Council*
 28 *Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d at 925 n.2. Additionally, the American

REQUEST FOR JUDICIAL NOTICE IN
 SUPPORT OF MOTION TO DISMISS 13
 CIV. 1196 (EMC)

1 Heart Association Heart Check program website, available at:
 2 <http://www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/HeartSmartShopping/Heart->
 3 Check-Mark_UCM_300133_Article.jsp, is an appropriate subject of judicial notice because the
 4 American Heart Association is a reputable and respected organization, whose website plaintiffs
 5 relied on in filing the amended complaint, and, thus, the website's accuracy cannot be reasonably
 6 disputed. *See, e.g., McDaniel v. GEICO Gen. Ins. Co.*, No. 1:12-CV-2028, 2013 WL 1790167,
 7 at *8 (E.D. Cal. Apr. 26, 2013) (taking judicial notice of a private website because its contents
 8 were not "subject to reasonable dispute").

9 Exhibits 29 through 33 are materials issued by the U.S. Food and Drug Administration
 10 and U.S. Federal Trade Commission. Such regulatory materials issued by agencies of the
 11 government of the United States are appropriate subjects of judicial notice. *See, e.g., Wilson v.*
 12 *Frito-Lay North America, Inc.*, 2013 WL 1320468, at *4 (N.D. Cal. Apr. 1, 2013) (U.S. Food and
 13 Drug Administration materials part of public record and therefore subject to judicial notice);
 14 *Peviani v. Hostess Brands*, 750 F. Supp. 2d 1111, 1116 (C.D. Cal. 2010) ("a court may take
 15 judicial notice of matters of public record, including duly recorded documents, and court
 16 records"); *Ries v. Hornell Brewing Co.*, 2010 WL 2943860, at *5 n. 3 (N.D. Cal. July 23, 2010)
 17 (taking judicial notice of a document on the U.S. Food and Drug Administration's website).

18 Accordingly, BBUSA respectfully requests that the Court take judicial notice of each of
 19 the exhibits submitted with this request.

20

21

Dated: June 19, 2013

HOGAN LOVELLS US LLP

22

23

24

25

26

27

28

By: /s/ Mark C. Goodman

Mark C. Goodman
 Attorneys for Defendant
 Bimbo Bakeries USA, Inc.